LIBRARY
SUPREME COURT. U. S

Office-Supreme Court, U.S.
FILED
MAR 13 1968
JOHN F. DAVIS, CLERK

No. 1226

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1967

MARY LOUISE GRUMBLES, Joined by Her Husband, M. W. GRUMBLES; CATHRYNE S. HUDGINS, Joined by Her Husband, B. R. HUDGINS; and ROBERT HUDGINS,
Petitioners

v.

THE TIMES HERALD PRINTING COMPANY and JOHN W. RUNYON, CLYDE W. REMBERT and JAMES F. CHAMBERS, Trustees of the Voting Trust of the Stockholders of The Times Herald Printing Company, Dated December 15, 1960,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM E. BILLINGS
BILLINGS, PIERCE, GILLEY & STANTON
3030 Fidelity Union Tower
Dallas, Texas 75201

ROBERT A. FANNING
FANNING & HARPER
40th Floor, First National Bank Bldg.
Dallas, Texas 75202
Attorneys for Petitioners

INDEX

	Page
Judgment and Opinion Below	2
Jurisdiction	2
Question Presented	2
Statement of the Case	3
Jurisdiction of the United States District Court	4
Reasons for Granting the Writ	5
Special Issue No. 3 (Materiality)	6
Special Issue No. 4 (Reliance)	10
Special Issue No. 5 (Damages) and No. 6 (Notice)	12
Conclusion	14
Proof of Service	15
Appendix A	
Opinion of United States Court of Appeals	A-1
Appendix B	
Charge of the Court	B-1
Judgment	-9

Citations

Cases

Janigan v. Taylor, 344 F(2) 781 (1st Cir., 1965), cert. den. 382 U.S. 879, 1965 11

List v. Fashion Park, Inc., 340 F(2) 457, 462 (2nd Cir., 1965) cert. den. U.S. 811, 1965 ..... 6, 10, 11

Myzel v. Fields, 386 F(2) 718, (1967) 12

Rogen v. Ilikon Corp., 361 F(2) 260, 266 (1st Cir., 1966) 6, 10

Ross v. Licht, 263 F. Supp. 395, 410 (SD, N.Y., 1967) 10

SEC v. Texas Gulf Sulphur Co. 258 F. Supp. 262, 280 (SDNY, 1966) 7

U.S. v. Harrell 133 F(2) 504, (8th Circuit) 10

Vine v. Beneficial Finance Co., 374 F(2) 627, 635 (2nd Cir., 1967) 10

Voege v. American Sumatra Tobacco Corp., 241 F. Supp. 369, 375, Del. 1965 11

Statutes and Rules

Securities Exchange Act of 1934

15 U.S.C.A., §78a-78jj 4

15 U.S.C.A., §78aa 4

15 U.S.C.A., §78j 4

Securities Exchange Commission Rule 10b-5, 17 CFR 240, 10B-5 ..... 2, 4, 5, 10, 11, 14

Texts

Bromberg Securities Law-Fraud SEC Rule 10b-5, §8.3 at p. 199 6
(Published 1967, McGraw-Hill Book Company, Library of Congress Card Number 67-24473)

Bromberg Securities Law, Fraud, SEC Rule 10b-5, §8.6(2) at p. 212 11
(Published 1967, McGraw-Hill Book Company, Library of Congress Card Number 67-24473)

3 Loss, Securities Regulations, 1765 11

No.....

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1967

MARY LOUISE GRUMBLES, Joined by Her Husband, M. W. GRUMBLES; CATHRYNE S. HUDGINS, Joined by Her Husband, B. R. HUDGINS; and ROBERT HUDGINS,
Petitioners

v.

THE TIMES HERALD PRINTING COMPANY and JOHN W. RUNYON, CLYDE W. REMBERT and JAMES F. CHAMBERS, Trustees of the Voting Trust of the Stockholders of The Times Herald Printing Company, Dated December 15, 1960,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Mary Louise Grumbles, Joined by her Husband, M. W. Grumbles; Cathryne S. Hudgins, Joined by her Husband, B. R. Hudgins; and Robert Hudgins, your Petitioners, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered January 4, 1968.

JUDGMENT AND OPINION BELOW

There was no formal opinion of the United States District Court, Northern District of Texas, Dallas Division. The charge and judgment of that Court are set out in Appendix B to this Petition.

The opinion of the Court of Appeals has not yet been reported; it is reproduced in Appendix A to this Petition.

JURISDICTION

The judgment of the Court of Appeals (Appendix A) was entered January 4, 1968, and Petition for Rehearing was denied February 13, 1968. The jurisdiction of this Court is invoked under 28 U.S. Code, §1254(1).

QUESTION PRESENTED

Whether the Trial Court's charge to the jury satisfied Securities Exchange Rule 10b-5 and other fundamental requirements of law in a nondisclosure case when:

(1) Materiality should have been determined as a matter of law;

(2) the issue of reliance should not have been submitted in a Rule 10b-5 nondisclosure situation;

(3) the court's instructions effectively deprived petitioners of a proper finding of their damages; and

(4) the submission of the question as to when petitioners learned or should have learned of the nondisclosed offer was not raised by the evidence?

STATEMENT OF THE CASE

The Times Herald Printing Company publishes the Dallas Times Herald, an afternoon newspaper, and operates the KRLD radio and television station in Dallas, Texas. It is a Texas corporation and its stock is closely held. It has not been sold in any established market. Over 50% of its stock is in a voting trust of which John W. Runyon (Chairman of the Board), James F. Chambers, Jr. (President) and Clyde W. Rembert (Senior Vice President and President of KRLD) were the voting trustees. The Voting Trust Agreement provided for self-perpetuation by the trustees and gave the company first call on any stock offered for sale (Plaintiffs' Exhibit 7 at R. 290).

The shares owned by Petitioners (51,534 shares or 8.9% of the total outstanding shares of 475,045) were not subject to the voting trust (R. 254), and controlled the election of one director (R. 251).

Petitioners, unsophisticated investors, employed a stock broker, Mr. Hickman, to appraise their stock in the Spring of 1961. After receiving his report (Plaintiffs' Exhibit 8 at R. 296) on June 7, 1961, they agreed to sell all their stock to The Times Herald Printing Company at $30.00 per share, the appraised price. The sale occurred on or about June 22, 1961. The broker did not inquire about prior or pending offers in making his investigation, and no offers were disclosed to him by the insider officers with whom he dealt. The broker received

a commission of ¾ of 1% of the sales price, or $11,595.15, whereas he was to receive only $2,500.00 if no sale was effected.

While negotiating with Petitioners through the broker, Hickman, the voting trustees and directors of The Times Herald Printing Company met on May 20, 1961 to consider an offer by S. I. Newhouse to purchase 51% or more of the company on the basis of a total price of $25,000,000.00 or *$43.47 per share*. The Board and Trustees resolved to reject the offer but, *in view of the importance of the offer*, to recommend to the stockholders that they approve the Board's view and authorize the Board to formally reject the offer. While other stockholders were advised, the Petitioners were not informed of the offer, or the Board's action, and sold their stock on June 22, 1961 at $30.00 per share to the voting trustees of The Times Herald Printing Company.

After learning for the first time in May, 1965, of the Newhouse and other offers made prior to their sale, Petitioners brought suit for rescission and/or damages. The trial was before the jury on the damages claim and judgment was rendered on the jury answers to special issues that Petitioners take nothing.

JURISDICTION OF THE UNITED STATES DISTRICT COURT

The case arose under the Securities Exchange Act of 1934, 15 U.S.C.A., §78a-78jj. Jurisdiction is particularly based on 15 U.S.C.A. §78aa, 15 U.S.C.A. §78j and Se-

curities Exchange Rule 10-b-5, 17 CFR 240. 10 B-5. Use of the mails invoked the federal statutes and Rule (R. 329-331).

REASONS FOR GRANTING THE WRIT

This case involves the proper application of Securities Exchange Commission Rule 10b-5, 17 CFR 240.10B-5, to a suit for civil damages based on fraudulent concealment. It is the contention of Petitioners that the trial court committed fundamental error in charging the jury and in failing to properly apply Rule 10b-5. The Rule follows:

> "Rule 10b-5. *Employment of Manipulative and Deceptive Devices*
>
> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> (1) to employ any device, scheme, or artifice to defraud,
>
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

The trial court refused certain key special issues requested by Petitioners (R. 580-582) and submitted issues in its charge (Appendix B) which failed to con-

form to the Rule and were not raised by the evidence. The court first inquired in Special Issues 1 and 2 as to whether an offer was made, and, if so, whether it was concealed. The jury found that S. I. Newhouse made an offer to purchase 51% or more of the outstanding stock on the basis of a $25,000,000.00 total price and that it was indeed concealed.

SPECIAL ISSUE NO. 3 (MATERIALITY)

Special Issue 3 inquired as to whether the concealment was material. The jury answered "no" (App. B, p. B-5). An accepted test of materiality is whether a "reasonable man would attach importance * * * in determining his choice of action in the transaction in question." *(Rogen v. Ilikon Corp.*, 361 F(2) 260, 266 (1st Cir., 1966); *List v. Fashion Park, Inc.*, 340 F(2) 457, 462 (2nd Cir., 1965) cert. den. 382 U.S. 811, 1965). See also *Bromberg, Securities Law-Fraud SEC Rule 10b-5*, §8.3 at p. 199 where the author refers to the jury's "*dubious*" conclusion of no materiality in this case. While materiality is clearly an element of proof under the Rule, there was no fact issue as to materiality. It was admitted by Respondents during the trial and in jury argument that the Newhouse offer was made and not revealed to Petitioners. That the offer was for 51% or more of the stock was likewise uncontested. Respondents contended that the offer was immaterial as Petitioners held only a minority interest of 8.9% of the total outstanding. Again, the stock ownership was undis-

puted. It should be considered that material information "need not be limited to information which is translatable into earnings * * *." *SEC v. Texas Gulf Sulphur Co.*, 258 F. Supp. 262, 280 (SDNY), 1966). Likewise it was undisputed that The Times Herald Board of Directors met on May 20, 1961 while negotiations for purchase of Petitioners' stock were in progress (R. 305-307) and considered the Newhouse offer. The minutes (R. 305-307) recited the following:

> "MINUTES OF A SPECIAL MEETING OF THE BOARD OF DIRECTORS OF THE TIMES HERALD PRINTING COMPANY HELD AT ITS OFFICE IN THE CITY OF DALLAS, TEXAS, ON SATURDAY, MAY 20, 1961, AT 9:30 A.M.
>
> "The meeting was called to order by the Chairman of the Board, John W. Runyon. The following Directors were present: John W. Runyon, James F. Chambers, Jr., Clyde W. Rembert, Albert N. Jackson, Clyde A. Taber, Allen Merriam, B. C. Jefferson, Felix R. McKnight, George S. Johnson, Robert G. Payne and Orrin Miller.
>
> "A quorum being present, the meeting was declared open and ready for business.
>
> "Upon motion made by Director Albert N. Jackson and seconded by Director George S. Johnson, the reading of the minutes of the previous meeting of the Board of Directors was waived.
>
> "Mr. James F. Chambers, Jr., President, advised the Board of Directors of an offer by Samuel Irving Newhouse to buy the stock of The Times Herald Printing Company. All members of the Board of Directors expressed their views with reference to such offer. "The Voting Trustees stated, however,

that in view of the importance of this matter and in view of the fact that all individual stockholders might not be in agreement, it was planned that each individual stockholder would be apprised of this offer and would be given an opportunity to approve or disapprove the vote of the Voting Trustees.

"Upon motion made by James F. Chambers, Jr., and seconded by Albert N. Jackson, the following resolution was adopted by unanimous vote of the Board of Directors: RESOLUTION

"WHEREAS, an offer for the purchase of the stock of The Times Herald Printing Company, made by Samual Irving Newhouse of New York City, has been conveyed through the Republic National Bank of Dallas to the officers of The Times Herald Printing Company; and

"WHEREAS, such offer has been presented to the full Board of Directors of The Times Herald Printing Company and has been fully discussed and considered by said Board,

"NOW, THEREFORE, BE IT RESOLVED, by the Board of Directors of The Times Herald Printing Company that in the unanimous opinion of the members of said Board of Directors said offer is not acceptable and should not be accepted, and the Board of Directors hereby recommends to the stockholders of The Times Herald Printing Company that they approve this expression of the unanimous view of the Board of Directors and authorize the Board of Directors formally to reject said offer. "There being no further business to bring before the Board, the meeting was adjourned."

It was undisputed that the Newhouse offer referred to was to pay $25,000,000.00 for all of the stock or a pro-rata amount for 51% or more. In fact Mr. Stanley

Marcus testified that he had a cashier's check in hand for 25 or 30 million dollars with which to consumate the purchase. (R. 263-277). With no pertinent facts in dispute, materiality became a matter of law to be resolved by the Court. The Respondents admitted the "importance" of the matter in the minutes. The Court's definition of "Material" (Appendix B, p. B-3—B-4) included "important" as synonymous with "material." Thus it would seem inescapable that materiality was present as a matter of law. A simple informative phone call to Petitioners who lived in Dallas would have permitted them

> (1) to inquire of Newhouse if he wished to buy their minority interest, or
>
> (2) to attempt to persuade other stockholders to join them in a sale of 51% or more stock to Newhouse, or
>
> (3) to re-evaluate their stock and determine whether to demand more than $30.00 per share.

While it is true that the broker, Hickman, and the Respondents' expert, Mr. Cartwright, testified that $30.00 was a fair price, their testimony was based entirely on the financial and other data furnished by The Times Herald. Hickman testified that information as to the offer would have benefitted Petitioners (R. 256). Mr. Cartwright testified that what somebody will pay for stock is an *important* consideration (R. 428). It is

significant here that Respondents not only had a duty under the Rule to disclose material facts, but had a contractual duty to disclose the offer by virtue of the resolution of the Board of Directors.

It is submitted, therefore, that the Court should have either found materiality as a matter of law, or have disregarded the jury's negative finding as contrary to the overwhelming weight of the evidence. *U. S. v. Harrell* 133 F(2) 504, (8th Circuit).

SPECIAL ISSUE NO. 4 (RELIANCE)

Special issue No. 4 (App. B. p. B-5) inquired as to petitioners' reliance. Rule 10B-5 however does not by its terms require "reliance" to be proved. Nor does there appear to be a rational basis for reading this element into the Rule in *non-disclosure* cases. While some courts require reliance, they apparently are influenced by the common law fraud action which invariably included reliance as an element. [*Rogen v. Ilikon Corp.*, 361 F(2) 260, 266-268 (1st Cir., 1966), *List v. Fashion Park, Inc.*, 340 F(2) 457, 463 (2nd Cir., 1965), cert. den. 382 U.S. 811, 1965. See Also *Ross v. Licht*, 263 F. Supp. 395, 410 (SD, N.Y., 1967). In *Vine v. Beneficial Finance Co.*, 374 F(2) 627, 635 (2nd Cir. 1967], however, the court found reliance to be "unnecessary in the limited instance when no volitional act is required and the result of a forced sale is exactly that intended by the wrongdoers."

The difficulty is posed in the question, "how can a person rely on something unknown to him?" The court framed the issue thusly

> "Do you find * * * that such conduct, if any, in not disclosing the facts * * * was relied on by the Plaintiffs in selling their stock for $30.00 per share?" (App. B, p. 5).

It is submitted that as framed the issue defies clear understanding.

Bromberg *(Securities Law, Fraud, SEC Rule 10b-5,* suggests in §8.6(2) at p. 212 that an answer to the "reliance" question is to presume reliance from materiality *(Janigan v. Taylor,* 344 F(2) 781 (1st Cir., 1965), cert. den. 382 U.S. 879, 1968; *Voege v. American Sumatra Tobacco Corp.,* 241 F. Supp. 369, 375, Del. 1965). "It is more straightforward than requiring an empty pleading and proof, or playing word games with nondisclosure."

It is arguable that reliance is a necessary precedent to compensable damages. Where, however, a material nondisclosure is involved, it should only be necessary to prove that damages resulted. To add an additional element of proof (reliance) increases the Plaintiffs' burden over and above the requirements of the Rule.

Professor Loss (3 Loss, Securities Regulations, 1765) points out in nondisclosure cases that if reliance is a prerequisite of a Rule 10b-5 action, it is "little more than a

formal requirement." In *List v. Fashion Parks, Inc.*, 340 F(2) at 463, it is stated:

> "On the other hand, we do not agree with certain overtones in the opinion of the trial court concerning the meaning of 'reliance' in a case of non-disclosure under Rule 10b-5. The opinion intimates that the plaintiff must prove he actively relied on the silence of the defendant, either because he consciously had in mind the negative of the fact concealed, or perhaps because he deliberately put his trust in the advice of the defendant. Such a requirement, however, would unduly dilute the obligation of insiders to inform outsiders of all material facts, regardless of the sophistication or naivette of the persons with whom they are dealing. * * *

In *Myzel v. Fields*, 386 F(2) 718, (1967) at note 33, p. 739, it is stated:

> "Congress did not intend for the courts to become lost in conclusory language, but to effectuate the desirable ends of the Act."

It would seem that "reliance" should no longer be an element of proof under Rule 10B-5. A declaration to that effect by this honorable court would eliminate the apparent confusion in the Courts of Appeal.

SPECIAL ISSUES NO. 5 (DAMAGES) AND NO. 6 (NOTICE)

While Petitioners requested a damage issue (No. 7, R.582) inquiring as to the *true value* (there being no market) of the stock on the date of sale, this was refused. Instead, the court submitted damages in two is-

sues (Nos. 5 and 6, Appendix B, p. B-6). The court first inquired as to whether Petitioners were damaged. Only if answered affirmatively was the jury to answer the next issue (No. 6) which inquired as to the *fair market value* per share. The jury answered that Petitioners were not damaged and accordingly did not answer Special Issue No. 6. It should be noted here that the jury was instructed (Appendix B, p. B-6) that plaintiffs could not recover if petitioners knew or should have known of the offers prior to January 21, 1964. The question of notice was posed in Special Issue No. 7 (Appendix B, p. B-7) and the jury found that petitioners knew or should have known of the offer on May 20, 1961, the date of Board of Directors meeting at which the Newhouse offer was discussed. For the jury to make this finding, they had to assume immediate access to the Board minutes or a duty to daily inspect the complete corporate records. No such duty or access were proved.

Petitioners believe it was error for the court:

(1) to submit generally the question of damages, as only the value of the stock was pertinent, and

(2) to submit the value issue (No. 6) conditioned on an affirmative answer to the general issue, No. 5, when only the value was a material issue, and

(3) to instruct the jury that petitioners could not recover if they knew or should have known of the offers prior to January 21, 1964. There was *no evidence whatsoever* of any notification of any offer, nor opportunity to learn of any offer, on the

part of petitioners. Furthermore, this instruction undoubtedly misled the jury to believe they could find no damages if they answered Special Issue No. 7 with a date prior to January 21, 1964.

There being no evidence to support the submission of Special Issue No. 7 or the jury's answer thereto, and in light of the erroneous instruction given, petitioners were effectively deprived of findings on the damage question. There being no basis in the evidence for the instruction given, and no foundation in the Rule for the submission as made, petitioners were deprived of their fundamental right to a fair determination of their damages.

It is noteworthy that the trial court refused to admit testimony as to offers by the Dupont and Rollins interests based on 1962 financial data while admitting evidence of 1962 sales between insiders at $30.00 per share. These offers were each in the amount of $30,000,000 for all of the stock or $52.20 per share. (R. 459-460; 465-467; 474-476; 434-437; 543-545; 337). The Court of Appeals opinion said that this alleged error went "only to the question of damages" and this was without prejudice to petitioners as the jury decided there were no damages. (App. A, p. A-2). Again, this accents the effect of errors in the Court's charge heretofore specified.

CONCLUSION

The design of the law is to protect those who in large part are at the mercy of the artful and the cun-

ning — from the wiles and strategems of those on the inside who would profit by the power or the profits they would gain from their manipulative and deceptive devices.

The trial court's fundamental errors in submitting its Charge to the Jury and in not disregarding certain jury findings, and the Court of Appeals affirmance of the Judgment deprived petitioners of the protection provided by SEC Rule 10B-5 from the arrogance of corporate power exemplified by Respondents' conduct. Accordingly, this petition should be granted.

Respectfully submitted,

WILLIAM F. BILLINGS

BILLINGS, PIERCE, GILLEY & STANTON
3030 Fidelity Union Tower
Dallas, Texas 75201

ROBERT A. FANNING
FANNING & HARPER
40th Floor, First National Bank Bldg.
Dallas, Texas 75202
Attorneys for Petitioners

PROOF OF SERVICE

This 11th day of March, 1968, I have mailed two (2) copies of PETITION FOR A WRIT OF CERTIORARY TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT to Mr. Jack Pew, Jr., Jackson, Walker, Winstead, Cantwell and Miller, First National Bank Building, Dallas, Texas, attorney for respondents.

.....

William F. Billings

APPENDIX A

In the
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 24407

MARY LOUISE GRUMBLES, Joined by her husband, M. W. GRUMBLES, ET. AL.
Appellants,

versus

THE TIMES HERALD PRINTING COMPANY, ET. AL.
Appellees.

Appeal from the United States District Court for the Northern District of Texas.

(January 4, 1968)

Before TUTTLE, GEWIN and GODBOLD, Circuit Judges.

PER CURIAM: This is an appeal from a judgment based on a jury verdict for the defendants in a suit brought by the appellants charging that the appellees were guilty of a violation of Rule X-10B-5, Securities and Exchange Commission, 17 C.F.R. 240.10B-5. The alleged violation occurred when the defendants in the trial court purchased the stock of the Times Herald Printing Company from the appellants without advis-

ing appellants of a certain material fact in connection with the sale, towit, the existence of "certain definite offers . . . to purchase all or a portion of the company stock at prices far in excess of $30 [the price at which the appellants sold] per share."

Except for rulings on admissibility of evidence, the issues were factual ones for the jury. These issues were all resolved against the appellants, having been presented to the jury in form of special issues. The jury having decided the issues of materiality, reliance by appellants, damages, and limitations against the plaintiffs, and it appearing that there was substantial evidence to support these findings, the jury verdict is final. Furthermore, the contention by the appellants that the trial court erred in not admitting evidence of certain offers made for 100% of the stock in subsequent years, goes only to the question of the amount of damages. The jury having decided that the appellants failed to prove the substance of their case of reliance and materiality of the withheld information, any error dealing with the refusal by the trial court to admit evidence showing the amount of damages would be without prejudice to the appellants, since no matter how much the damages might be proved to have been, the jury decided they were not entitled to any.

The judgment is AFFIRMED.

APPENDIX B

Charge of the Court

(Number and title omitted) (Filed: Nov. 2, 1966)

MEMBERS OF THE JURY:

In this case Plaintiffs are Mary Louise Grumbles, joined by her husband, M. W. Grumbles; Cathryne S. Hudgins, joined by her husband, B. R. Hudgins; and Robert Hudgins. Defendants are The Times Herald Printing Company and John W. Runyon, Clyde W. Rembert and James F. Chambers, Trustees of the Voting Trust of the Stockholders of The Times Herald Printing Company.

Plaintiffs Mary Louise Grumbles, *Catheryne* S. Hudgins and Robert Hudgins were each the owners of 17,178 shares of common stock of The Times Herald Printing Company prior to 1961. In 1961 they became interested in selling such stock and contacted J. W. Hickman, to investigate the value of the stock and report his opinion to them. In June 1961 he completed his report, placing a value of $30 per share on the stock. The stock was purchased by The Times Herald Printing Company acting through Trustees for $30 a share, the sale being consummated on or about June 21, 1961.

It is the contention of the Plaintiffs that The Times Herald Printing Company before the date of the sale by Plaintiffs had received offers to purchase a stock of The Times Herald Printing Company for a price in excess of $30 per share. It is their further contention

that The Times Herald Printing Company, its officers and employees failed to disclose these offers to the Plaintiffs, that such concealment was material and that if they had know of such offers they would not have sold their stock at $30 per share.

Plaintiffs ask for damages in an amount equal to the difference between what they received for their stock and its fair market value as contended by them on or about June 21, 1961.

It is the contention of The Times Herald Printing Company and the Voting Trustees that Plaintiffs and J. W. Hickman were permitted to examine all records of The Times Herald Printing Company and were furnished all information requested. It is their further contention that the circumstances surrounding previous offers were conditioned on acquisition of not less than 51% of the outstanding stock and that the value when 51% or more is acquired exceeds the value when less than 51% is acquired. It is the further contention of the Defendants that offers to purchase 51% or more of the stock were immaterial because that amount of stock was not for sale in any event. It is their further contention that Plaintiffs relied solely on the advice of J. W. Hickman.

The Plaintiffs owned approximately 9% of the stock of the Times Herald Printing Company, this percentage entitling an owner or owners of such stock to one director on the Board of Directors.

The issue in this case for your consideration is whether The Times Herald Printing Company, its officers or employees concealed material facts from the Plaintiffs which were relied upon to the damage of the Plaintiffs.

For the Plaintiffs to recover you must find by a preponderance of the evidence that in the negotiations leading up to the sale by the Plaintiffs of their stock in The Times Herald Printing Company, The Times Herald Printing Company, its officers or employees concealed material facts which conduct was relied upon by the Plaintiffs to their damage. If, however, you find by a preponderance of the evidence that Plaintiffs knew or in the exercise of reasonable care should have known of the offers, if any, set out in your answer to Special Issue No. 1 prior to January 21, 1964, the Plaintiffs cannot recover.

In connection with the foregoing instructions and the following special issues, you are instructed:

By the term "preponderance of the evidence" as used in this case is meant the greater weight and degree of credible testimony before you.

By the term "credible testimony" is meant that testimony which the Jury deem and find to be worthy of belief.

By the term "material" as used in this charge, I instruct you that for a fact to be material to a transaction,

it should be of solid or weighty character, substantial, of consequence, not to be dispensed with, important.

By the term "fair market value" as used in this charge is meant the price which property will sell for when offered for sale by a person who is willing to sell, but not required to sell to a purchaser who is willing to purchase, but who is not required to purchase, when both have reasonable knowledge of the facts.

Bearing in mind the foregoing instructions and definitions you will answer the following special issues in accordance with the instructions in connection with each special issue.

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that prior to June 21, 1961 S. I. Newhouse or John Cecil Mullins made an offer to purchase 51% or more of the outstanding stock of The Times Herald Printing Company on the basis of $25,000,000 for all of such stock?

Answer "yes" or "no" as to each party.

(A) S. I. Newhouse *Yes*

(B) John Cecil Mullins *No*

If you have answered either paragraph of special issue no. 1 "yes", then answer special issue no. 2. Otherwise, do not answer special issue no. 2.

SPECIAL ISSUE NO. 2

Do you find from a preponderance of the evidence that the Times Herald Printing Company, its officers

and employees failed to disclose to the Plaintiffs or J. W. Hickman the facts pertaining to such offer or offers, if any?

Answer "yes" or "no" as to each party.

(A) Mary Louise Grumbles *Yes* (B) M. W. Grumbles *Yes*

(C) Cathryne S. Hudgins *Yes* (D) B. R. Hudgins *Yes*

(E) Robert R. Hudgins *Yes* (F) J. W. Hickman *Yes*

If you have answered any of the paragraphs of special issue no. 2 "yes", then answer special issue no. 3. Otherwise, do not answer special issue no. 3.

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that such concealment, if any, was a material fact in connection with the sale of the stock involved herein:

Answer "yes" or "no" ANSWER: *No*

If you have answered any of the paragraphs of special issue no. 2 "Yes", then answer special issue no. 4. Otherwise, do not answer special issue no. 4.

SPECIAL ISSUE NO. 4

Do you find from a preponderance of the evidence that such conduct, if any, of the Times Herald Printing Company, its officers and employees, in not disclosing the facts, if any, pertaining to the offer or offers, if any,

was relied on by the Plaintiffs in selling their stock for $30 per share?

Answer as to each plaintiff.

(A) Mary Louise Grumbles *No*

(B) Cathryne S. Hudgins *No*

(C) Robert R. Hudgins *No*

If you have answered any one of the paragraphs of special issue no. 2 "yes", then answer special issue no. 5. Otherwise, do not answer special issue no. 5.

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that the Plaintiffs, or any one of them, were damaged by the failure, if any, of The Times Herald Printing Company, its officers and employees, to disclose certain facts, if any?

Answer "yes" or "no" as to each party.

(A) Mary Louise Grumbles *No*

(B) Cathryne S. Hudgins *No*

(C) Robert R. Hudgins *No*

If you have answered any part of special issue no. 5 "yes", then answer special issue no. 6. Otherwise, do not answer special issue no. 6.

SPECIAL ISSUE NO. 6

From a preponderance of the evidence, what do you find the fair market value of Plaintiffs' shares of stock

in The Times Herald Printing Company to have been on a per share basis on or about June 21, 1961?

Answer in dollars, if any, and cents, if any.

Answer.....

SPECIAL ISSUE NO. 7

At what time do you find from a preponderance of the evidence did the Plaintiffs or any of them learn or in the exercise of reasonable care should have learned of the offers if any, to purchase Times Herald Company stock made prior to June 21, 1961?

Answer as to each party.	Approximately
(A) Mary Louise Grumbles	5/20/61
(B) Cathryne S. Hudgins	5/20/61
(C) Robert R. Hudgins	5/20/61

You are the sole judges of the facts, of the credibility of the witnesses and of the weight and credit to be given to the testimony, but the law you are bound to receive from the Court as it is given you herein, and be governed thereby. Arguments of Counsel are not in evidence, nor are they to be taken as correct statements of the law, if contrary to that which is given you by the Court.

You are further instructed that while you are deliberating upon your answers to the special issues that have been submitted to you, you will not mention or refer to, nor take into consideration any matter, fact or circumstance, other than the testimony that has been

admitted before you, all of which I instruct you particularly to observe and obey.

You are further instructed that each special issue must be answered by an unanimous vote of the Jury.

You will retire to the jury room, select your own foreman and write your answers to the special issues in the blank space left after each special issue for that purpose. Your foreman will sign the form of verdict as it is shown below.

/s/ SARAH T. HUGHES
U. S. District Judge

VERDICT:

We, the Jury, have answered the foregoing special issues as indicated above and herewith return the same into court as our verdict in this case.

/s/ RUTH A. MYCUE
Foreman of the Jury

Judgment

(Number and title omitted) (Filed: Nov. 14, 1966)

ON THE 31st day of October, 1966, came on to be heard the above entitled and numbered cause and came the Plaintiffs, MARY LOUISE GRUMBLES, CATHRYNE S. HUDGINS, B. R. HUDGINS and ROBERT HUDGINS, and each of them in person and by and through their attorneys of record, and came the Defendants, JOHN W. RUNYON, CLYDE W. REMBERT and JAMES F. CHAMBERS, in person and by and through their attorneys of record, and came THE TIMES HERALD PRINTING COMPANY by and through its attorneys of record, and all parties having announced ready, and jury demand having been timely filed under Rule 38, Federal Rules of Civil Procedure, and all parties having consented to submit all issues of fact to a jury, and the Court having so ordered, and a jury having been duly sworn and impaneled, and the Court having submitted interrogatories to the jury, and the jury having returned its verdict into open Court, and same having been accepted and approved by the Court and filed, and the Court being of the opinion that the Defendants, and each of them, are entitled to judgment that Plaintiffs take nothing, it is, accordingly,

ORDERED, ADJUDGED AND DECREED that the Plaintiffs MARY LOUISE GRUMBLES, M. W. GRUMBLES, CATHRYNE S. HUDGINS, B. R. HUDGINS and ROBERT HUDGINS, and each of

them, take nothing against the Defendants, THE TIMES HERALD PRINTING COMPANY, JOHN W. RUNYON, CLYDE W. REMBERT and JAMES F. CHAMBERS, or any of them.

It is further ORDERED, ADJUDGED AND DECREED that costs of Court be, and the same are hereby, taxed against the Plaintiffs, and each of them, for which let execution issue.

SIGNED AND ENTERED this 10 day of November, 1966.

/s/ SARAH T. HUGHES
U. S. District Judge